JUL 12
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1908

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION, and

BETHLEHEM STEEL CORPORATION,

Petitioners

v.

RICHARD A. ASH, On Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING, MODIFICATION OF OPINION, AND REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WITH FURTHER INSTRUCTION

CLETUS P. LYMAN
1612 Latimer Street
Philadelphia, Pennsylvania 19103
Attorney for Respondent

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

Petition for Rehearing

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1908

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION, and

BETHLEHEM STEEL CORPORATION,

Petitioners

v.

RICHARD A. ASH, On Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING, MODIFICATION OF OPINION, AND REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WITH FURTHER INSTRUCTION

Respondent, Richard A. Ash, hereby petitions the Court for rehearing, for modification of Note 6 of the

Court's opinion (Slip Opinion, 6), and for remand to the United States Court of Appeals for the Third Circuit with instruction to decide whether Respondent's amended complaint states a cause of action under Delaware law for *ultra vires* acts, arising under federal law (18 U.S.C. § 610), within the meaning of 28 U.S.C. § 1331. In support of his petition, Respondent avers:

1. The Court reversed the United States Court of Appeals for the Third Circuit, holding that Respondent, under the circumstances of the 1974 Amendments to the Federal Elections Campaign Act, did not have an implied right to sue for injunctive relief under § 610 (Slip Opinion, 9); and, that Respondent had no implied right to sue derivatively on behalf of his corporation for damages "because implication of a federal right of damages on behalf of a corporation under § 610 would intrude into an area traditionally committed to state law without aiding the main purpose of § 610." (Slip Opinion, 18).

2. The Court stated: "[I]t is entirely appropriate in this instance to relegate respondent . . . to whatever remedy is created by state law." (Slip Opinion, 17).

3. Respondent desires to continue this action in the United States District Court for the Eastern District of Pennsylvania. He believes that the body of the Court's Opinion creates no barrier to his pursuing below his theory that he may maintain an action for *ultra vires* acts under 28 U.S.C. § 1331. As stated in Respondent's brief, he believes that Delaware corporate law prohibits violation of federal criminal statutes, including § 610, and, because resolution of such a dispute involves interpretation of substantive federal law, the action is within the meaning of "arises under" federal law, as meant by § 1331. (Brief for Respondent, 47-54).

4. Respondent respectfully submits that an unfortunate conjunction of phrases in Note 6 may prejudice the pursuit of his theory in the Court of Appeals even though the primary conclusion in Note 6 (not here questioned) is that Respondent's theory is not properly before the Court, not having been raised by a petition for certiorari or in the brief in opposition thereto. The series of phrases from which relief is sought are as follows:

> "We do not think the pendent state law claim was preserved . . . [t]herefore, there is not properly before us Respondent's argument . . . that his ultra vires cause of action 'arises under' federal law, that is § 610, within the meaning of 28 U.S.C. § 1331." [Intermediate phrases deleted for emphasis].

The above-quoted language seems, erroneously, to equate the pendent state law claim with the *ultra vires* claim sought to be maintained under § 1331.

5. Respectfully, we think the Court must agree that the concepts of a state claim under pendent jurisdiction and a claim under § 1331 jurisdiction are different. Note 6 determines that Respondent "has foreclosed himself from consideration" of the pendent claim because it is not now raised by the operative pleading. While we do not agree with this construction of the history of the case, we do not here challenge that determination. We now urge, assuming the pendent claim was dropped from the complaint, that the amended complaint well-pleaded a state cause of action for which there is statutory jurisdiction under § 1331. We do not think that Note 6 expressly rules to the contrary but, because of the seeming equation of the pendent claim and the § 1331 *ultra vires* claim, the Court of Appeals may be uncertain as to this Court's position on the matter.

6. The prejudice to Respondent from the seeming equation of the pendent claim to the § 1331 state claim is compounded by the observation in Note 6:

> "Not only was Count II [the pendent state claim] dropped from the case by Respondent, and no argument addressed to it made by him in the . . . Court of Appeals, . . ."

The statement as quoted is correct by itself but not if the dropping of Count II is equated to dropping the § 1331 claim, which is the natural reading in light of the seeming equation of the two claims. *Ultra vires* was raised in Respondent's reply brief in the Court of Appeals (6-8) and, at oral argument there, the concept of a "federalized state claim" was argued by Respondent (untranscribed notes of argument exist in that court's files). The Court of Appeals never reached the state cause of action under § 1331 because of its holding of a federal cause of action.

7. The amended complaint (A70-A76) must speak for itself and there is not much utility to argument if the Court disagrees with Respondent's position that, under the rules and precedents of federal pleading, it constitutes a well-pleaded § 1331 claim. We would point out, however, that paragraph 12 (A72) clearly invokes § 1331, and the balance of the complaint is a recitation of facts which states a cause of action under Delaware corporate law, prohibiting *ultra vires* acts. True, there is no use of the phrase *"ultra vires"* but there is a statement that the acts were in violation of state law. (A72, para. 14).

8. Although the motion in the district court was called "summary judgment", it was made without affidavits denying factual allegations. As such, the district court was obligated to regard it as the equivalent of a

motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b) (6). Moore, Federal Practice, para. 56.11[2]. It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). And, the district court had a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. *Robertson* v. *Johnston,* 376 F.2d 43 (5th Cir. 1967). Moreover, complaints may not be dismissed for pleading the wrong theory of law or for pleading no theory of law. If a complaint alleges facts, which, under any theory of law, would entitle the complainant to recover, the complaint may not be dismissed for failure to state a claim. *Due* v. *Tallahassee Theaters, Inc.,* 333 F.2d 630, 631 (5th Cir. 1964).

9. For the foregoing reasons, Respondent respectfully requests that the Court modify Note 6 so as to state:

> "Respondent urges that, even without Count II, he has pleaded facts constituting a claim based on *ultra vires* acts in violation of Delaware corporation law, and that he may assert it in federal court under 28 U.S.C. § 1331, based on our holding in *Smith* v. *Kansas City Title and Trust,* 255 U.S. 180 (1920). Since this argument was not raised in the petition for certiorari, it is not properly before us, and Respondent may pursue this argument below on remand."

WHEREFORE, Respondent requests that his petition for rehearing be granted, that the Court modify Note 6 of its opinion, and that the case be remanded to the United States Court of Appeals for the Third Circuit to consider Respondent's arguments that, for reasons not raised in

the petition for certiorari, the grant of summary judgment by the district court was error.

Respectfully submitted,

CLETUS P. LYMAN
1612 Latimer Street
Philadelphia, Pennsylvania 19103

Attorney for Respondent

CERTIFICATE OF COUNSEL

The Undersigned member of the bar of the Court hereby certifies that the foregoing Petition is presented in good faith and not for delay.

CLETUS P. LYMAN